NO. 80-5061

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DENNIS O'CONNOR, et ux, Appellant,

vs.

PALLUDAN CORPORATION, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE

STATE OF NEVADA

MOTION TO DISMISS APPEAL

MARIO G. RECANZONE, ESQ.
DIEHL, RECANZONE & EVANS
A Professional Corporation
65 South Maine Street
Fallon, Nevada 89406

Attorneys for Appellee

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
65 S. MAINE
FALLON, NEVADA

INDEX

	Page
Motion to Dismiss Appeal	1
Statement	1,2
Appellants' Motion to Proceed Informa Pauperis Should Not Be Granted	2,3
No Substantial Federal Question Exists for Review	4,5,6,7
Conclusion	7

CITATIONS

Cases

Adkins v. E. I. DuPont DeNemours & Co., (1948) 335 U.S. 331, 93 L.Ed. 43, 69 S.Ct. 85	3
Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971)	5,6
Douglas v. California, 372 U.S. 353 (1963)	4
Faretta v. Calif., 422 U.S. 806, 45 L.Ed.2d 562 95 S.Ct. 2525 (1975)	5
Griffin v. Illinois, 351 U.S. 12 (1956)	4
Jefferson v. United States, (1960, CA.9 Cal.) 277 F.2d 723, cert. denied 364 U.S. 896, 5 L.Ed.2d 190, 81 S.Ct. 227	3
Mirin v. Justices of Supreme Court of Nevada, 415 F.Supp. 1178 (1976)	5
Price v. Johnston, 334 U.S. 266	5
Ross v. Moffitt, 417 U.S. 600 (1974)	4
United States v. Coor, (1963, D.C. Dist.Col.) 213 F. Supp. 955	3

Statutes

Art. 1, §8, Nevada State Constitution	4,5
Rule 46(b), NRAP	2,4,5,7
28 U.S.C. §1257(2)	4
Rule 16, U. S. Supreme Court Rules	1

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
65 S. MAINE
FALLON, NEVADA

NO. 80-5061

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DENNIS O'CONNOR, et ux, Appellant,

vs.

PALLUDAN CORPORATION, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEVADA

MOTION TO DISMISS APPEAL

Pursuant to Rule 16(b) and Rule 16(d) of the Rules of the Supreme Court of the United States, Appellee, PALLUDAN CORPORATION, moves to dismiss the appeal of DENNIS O'CONNOR, et ux, on the ground that Appellants are not indigents and should not be allowed to proceed informa pauperis; and that Appellants have not raised substantial constitutional questions for review.

STATEMENT

This is a direct appeal to the U. S. Supreme Court from

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
65 S. MAINE
FALLON, NEVADA

the order of the Supreme Court of the State of Nevada dismissing Appellants' appeal filed therein because of Appellants' failure to comply with an order of said court to procure an attorney and reply through counsel pursuant to Rule 46(b) of the Nevada Rules of Appellate Procedure.

Appellants, DENNIS O'CONNOR, et ux, were the defendants in an action filed in the Third Judicial District Court of the State of Nevada, in and for the County of Churchill, for eviction from, and restitution of, the commercial premises leased by PALLUDAN CORPORATION to the O'CONNORS. The trial court entered summary judgment for PALLUDAN CORPORATION, and the O'CONNORS eventually appealed said order. The trial court then denied the O'CONNORS' motion for stay of judgment pending appeal. The O'CONNORS then filed papers with the Nevada Supreme Court to have the judgment stayed pending appeal, which the court denied without prejudice to refile. Thereafter, another motion to stay judgment pending appeal was filed and denied. The O'CONNORS' third motion to stay judgment pending appeal was also denied. Thereafter, the Nevada Supreme Court ordered the O'CONNORS to procure an attorney and reply through counsel to PALLUDAN CORPORATION'S motion to dismiss the appeal. However, the O'CONNORS filed, pro se, points and authorities in opposition to the motion to dismiss and argued therein their constitutional right to proceed in the Nevada Supreme Court without counsel.

APPELLANTS' MOTION TO PROCEED INFORMA PAUPERIS SHOULD NOT BE GRANTED

Appellants filed a motion to proceed informa pauperis pursuant to Rule 53(1) (sic) of the rules of this court. Dis-

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
85 S. MAINE
FALLON, NEVADA

regarding the error by Appellants in the proper rule number, the affidavit accompanying such motion lacks necessary facts for the court to make a determination as to Appellants' indigency. As stated in Jefferson v. United States, (1960, CA.9 Cal.) 277 F.2d 723, cert. denied 364 U.S. 896, 5 L.Ed.2d 190, 81 S.Ct. 227, it is essential for affidavits in support of motion to proceed informa pauperis to state facts as to affiant's poverty with some particularity, definiteness and certainty. See also, United States v. Coor, (1963, D.C. Dist.Col.) 213 F.Supp. 955, which indicates that affidavits should be sufficient to base indictment for perjury, if false. In Appellants' affidavit there are no facts stated. The affidavit is based solely upon conclusionary statements.

There is one statement in Appellants' affidavit that seems to be supported by Adkins v. E. I. DuPont DeNemours & Co., (1948) 335 U.S. 331, 93 L.Ed. 43, 69 S.Ct. 85. The statement seems to have been quoted verbatim from the case and reads, "Because of our poverty we are unable to pay the costs of said cause and still be able to provide ourselves and our children with the necessities of life." A very conclusionary statement in light of the fact that the U. S. District Court for the District of Nevada, in a related action, denied Appellants permission to proceed informa pauperis in the Federal Court because Appellants earn in excess of EIGHT HUNDRED ($800.00) DOLLARS per month take-home pay and that they have adequate funds to proceed if they choose to do so. See minute orders entered by the HON. EDWARD C. REED, JR., U. S. District Judge for the Federal District Court of Nevada, which are attached hereto, marked Exhibit "A", and by reference herein, incorporated into this document.

Therefore, Appellants' motion to proceed informa pauperis should be denied.

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
69 S. MAINE
FALLON, NEVADA

NO SUBSTANTIAL FEDERAL QUESTION EXISTS FOR REVIEW

Appellants assert jurisdiction pursuant to 28 U.S.C. §1257(2), which provides that,

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ...
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> ..."

Appellants contend that Rule 46(b) of the Nevada Rules of Appellate Procedure, which provides that, "No party, except a habeas corpus petitioner, may appear in proper person before the Supreme Court.", is unconstitutional.

In support of their argument of a constitutional right to appear pro se before the Nevada Supreme Court in a civil appeal, appellants rely upon Griffin v. Illinois, 351 U.S. 12 (1956), Ross v. Moffitt, 417 U.S. 600 (1974) and Douglas v. California, 372 U.S. 353 (1963), all of which dealt with criminal defendents' rights, however, and not civil litigants. Unlike criminal matters, civil lawsuits, such as this one, do not involve the government as a party, and there is no deprivation of life, liberty or property as punishment for crime. This distinction between civil and criminal proceedings is important as criminal defendants have rights guaranteed by explicit clauses of the constitution.

Further, Appellants cite Art. 1, §8 of the Constitution of the State of Nevada which they claim supports their right to appear pro se. Art. 1, §8, provides that, "[I]n any

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
69 S. MAINE
FALLON, NEVADA

trial,..., the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions." However, Art. 1, §8, deals with rights of criminal defendants and not civil litigants. In fact, there is no provision in Nevada Constitution that mandates that a civil litigant has a right to appear before the Nevada Supreme Court for himself.

In Faretta v. Calif., 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), the U. S. Supreme Court distinguished the federal constitutional nature of defendant's right to conduct his own defense at the trial level from appellate stages of the judicial process. The court stated,

> "[I]n Price v. Johnston, 334 U.S. 266, the Court, in holding a convicted person had no absolute right to argue his own appeal, said this holding was in 'sharp contrast' to his 'recognized privilege of conducting his own defense at the trial." Id, at 285."

And, in Mirin v. Justices of Supreme Court of Nevada, 415 F.Supp. 1178 (1976), the court stated that, "The Supreme Court in Price made it unequivocally clear that the right to argue personally a criminal appeal does not rise to federal constitutional dimensions. It follows that a civil defendant's right to orally argue a civil appeal cannot even approach federal constitutional parameters." The court went on to find that Rule 46(b) of the Nevada Rules of Appellate Procedure was constitutional.

Appellants further rely upon Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971), for support of their argument. In that case, the court held that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving the relationship, due process prohibits a state from denying, solely because of inability to pay,

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
69 S. MAINE
FALLON, NEVADA

access to its courts to individuals who seek judicial dissolution of their marriages. The court went on to discuss other matters that may be affected by its decision, i.e., MR. JUSTICE DOUGLAS posed the following questions: "How about a requirement of an onerous bond to prevent summary eviction from rented property?... Is housing less important to the mucilage holding society together than marriage?" Thus, leaving one with the impression that the decision on Boddie, supra, could be extended. However, even conceding that Boddie should or could be extended to other areas other than the marital relationship, the rationale need not be extended to this case. This is an action involving the breach of a commercial lease of real property and the owner's actions to recover his property because of Appellants' failure to pay the rent when due. Certainly, not a situation analogous to the relationship of marriage, or even housing, to our society's hierarchy of values. The parties to a commercial lease have numerous methods of resolving disputes without resort to the judicial process. For example, the parties could agree to arbitration or other private settlement techniques, thereby precluding the judicial process from having exclusive or monopolistic control over disputes arising from commercial agreements. Therefore, the rationale of Boddie should not be extended to this case.

Appellants have cited several cases in support of their other arguments on appeal; however, most of those authorities address matters other than their contention that they have a constitutional right to appear pro se before the Nevada Supreme Court. Such other issues are not properly before the U. S. Supreme Court, at this time, because they were not properly presented at the trial level nor were they properly before the Nevada Supreme Court. However, even if they were, the Nevada

LAW OFFICES
EHL, RECANZONE
AND EVANS
A Professional
Corporation
65 S. MAINE
FALLON, NEVADA

Supreme Court disposed of the appeal by dismissal for failure to comply with Rule 46(b) of the Nevada Rules of Appellate Procedure and not on the constitutional issues. Therefore, since the Nevada Supreme Court did not consider Appellants' other issues as enumerated in their jurisdictional statement, those issues should not be considered by the U. S. Supreme Court.

CONCLUSION

Since the only issue before the U. S. Supreme Court, at this time, is whether Appellants have a constitutional right to appear pro se before the Nevada Supreme Court on appeal, this appeal should be dismissed for lack of a substantial constitutional question for the reasons that Appellants are not indigents which would afford them any special constitutional protection and, furthermore, if they were, the right of an indigent to appear and argue for himself before a state appellate court is not mandated or required by the U. S. Constitution; and, therefore, no substantial federal question exists for the U. S. Supreme Court to decide.

DATED: This 30th day of September, 1980.

Respectfully submitted,

DIEHL, RECANZONE & EVANS
A Professional Corporation
Attorneys for Appellee
65 South Maine Street
Fallon, Nevada 89406

By _____

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
65 S. MAINE
FALLON, NEVADA

-(8)-

DENNIS O'CONNOR, et al., ENTERED

CIVIL NO. - R-80-49-[illegible]

MINUTES OF COURT

MAR 10 1980

DATE: March 6, 1980

VS.

FILED

THE NEVADA SUPREME COURT, et al.

MAR 10 1980

CLERK, U. S. DISTRICT COURT
DISTRICT OF NEVADA

PRESENT: HONORABLE EDWARD C. REED, JR. U. S. DISTRICT JUDGE

DEPUTY CLERK: A. Marvin Belart COURT REPORTER NA

COUNSEL FOR PLAINTIFF(S): NA

COUNSEL FOR DEFENDANT(S): NA

MINUTE ORDER IN CHAMBERS(xx)

PROCEEDINGS:

The above-entitled cause having come before the Court upon the Motion to Proceed In Forma Pauperis filed herein, and it appearing to the Court that the Affidavit in Support of Motion to Proceed In Forma Pauperis is insufficient to justify the granting of the Motion, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS

ORDERED that the Motion to Proceed In Forma Pauperis be, and it is hereby, denied; it is

FURTHER ORDERED that the Complaint filed herein be, and it is hereby, dismissed without prejudice.

"EXHIBIT A-1"

CARL C. FITZGERALD, CLERK

A. Marvin Belart

) FOR THE DISTRICT OF NE)
RENO, NEVADA

-(UZD)-

DENNIS O'CONNOR, et al.,

VS.

THE NEVADA SUPREME COURT, et al.

/

CIVIL NO. [illegible]

MINUTES OF COURT

DATE: July 3, 1980

FILED

JUL 3 1980

CLERK, U. S. DISTRICT COURT
DISTRICT OF NEVADA
BY ..... DEPUTY

PRESENT: HONORABLE EDWARD C. REED, JR. U. S. DISTRICT JUI

DEPUTY CLERK: A. Marvin Nelart COURT REPORTER NA

COUNSEL FOR PLAINTIFF(S): NA

COUNSEL FOR DEFENDANT(S): NA

MINUTE ORDER IN CHAMBERS(xx)

PROCEEDINGS:

The Court does hereby deny the motion filed by plaintiffs to reconsider the Court's previous order which denied permission to plaintiffs to proceed In Forma Pauperis and dismissed the complaint without prejudice. Documents filed with the motion indicate plaintiffs have an income in excess of $800.00 per month take home pay and, if they choose to do so, adequate funds to pay the costs of proceeding here.

"EXHIBIT A-2"

CAROL C. FITZGERALD, CLERK